

Dr Susan Pilch
Dockets Management Branch HFA 305,
Food & Drug Administration,
5630 Fishers Lane, Rm 1061,
Rockville Md 20852

RICHARD F JAMES
P.O. to
Whangarei
New Zealand
October 12 1999

Dear Dr Pilch,

Protein Technologies Inc.
Health Labelling Claim T-98-0683

Decisions of the New Zealand Broadcasting Standards Authority have the force of a Court judgement under the Broadcasting Act.

Television New Zealand is the government-owned national network.

After an introductory statement which summarised the actual decision of the Authority (copy enclosed herewith) and described how the nutritionist and the International Soy Advisory Board had not disclosed their relationship to the commercial promoters of soy products, the enclosed statement was broadcast nationally in the national womens' program "Good Morning" on Monday October 4, at 10.15 a.m.

I would like this to be on record on your file, as disclosure of known risks is the basis of many objections to the Health Claims Petition of Protein Technologies Inc.

Sincerely
98P-0683 *R James*

OB1

98P-0683

6 August 1999

CF 2/614

R J James
RD 4
WHANGAREI

Dear Mr James

The Authority has considered your complaint about the broadcast of *Good Morning* on 3 May 1999.

The Authority has issued a Decision in Part which sets out the grounds on which the complaint will be upheld. A copy of the Authority's Decision in Part is attached.

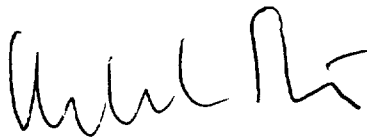
The Authority invites your comment on what penalty, if any, you consider would be appropriate on this occasion. I draw your attention to sections 13 and 16 of the Broadcasting Act 1989 which set out the penalties available. These include: the broadcast of a statement summarising the decision and the reasons why it was upheld, and the imposition of costs against the broadcaster up to the sum of \$5000


Please note that such submissions should be received by the Authority no later than 20 August 1999.

The Decision in Part which has been issued by the Authority is not the formal decision of the Authority to which s.13 of the Broadcasting Act 1989 applies. The formal decision of the Authority will be issued when matters of penalty have been determined.

Please note that submissions should be restricted to issues relevant to the question of penalty. The invitation to make submissions on penalty should not be regarded as an opportunity to re-litigate the original complaint.

Yours sincerely



 Phillipa Ballard
Complaints Manager

In May this year a nutritionist representing the International Soy Advisory Board appeared on *Good Morning*.

She participated in a cooking demonstration which included the use of soy products, and cited a number of health benefits of soy consumption. Among the ingredients used was the Sanitarium soy product So Good.

A formal complaint about this segment has been upheld by the Broadcasting Standards Authority, and it ordered TVNZ to broadcast this statement.

The Authority said the programme was at fault in not acknowledging that the nutritionist worked as a consultant for Sanitarium. And, it said, the broadcast lacked balanced because it failed to report the claim of some experts that there are health risks associated with use of soy.

BEFORE THE BROADCASTING STANDARDS AUTHORITY

Decision No: 1999- 148

Dated the 16th day of September 1999

IN THE MATTER of the Broadcasting Act 1989

AND

IN THE MATTER of a complaint by

R F JAMES
of Whangarei

Broadcaster
TELEVISION NEW ZEALAND LTD

S R Maling Chairperson
L M Loates
R McLeod
J Withers

DECISION

Summary

Good Morning's nutritionist interviewed a representative from the International Soy Advisory Board and demonstrated the use of soy products in cooking in a broadcast by TVNZ on TVOne on 3 May 1999 beginning at 10.00am.

Mr James of Whangarei complained to Television New Zealand Ltd that the programme was unbalanced, unfair and inaccurate as it did not warn viewers of the known health risks of using soy products, nor did it reveal that the guest was either a consultant to or an employee of a company which markets the products.

TVNZ responded that the programme did not purport to investigate the merits of soy products, but was essentially a cooking demonstration carried out while the guest discussed the principal ingredient. It maintained that as research on the benefits of soy products was equivocal, it was not in a position to judge whether the broadcast was accurate. It did not consider standard G6 was applicable to what was essentially a cooking demonstration, and declined to uphold the complaint.

Dissatisfied with TVNZ's decision, Mr James referred the complaint to the Broadcasting Standards Authority under s.8(1)(a) of the Broadcasting Act 1989.

For the reasons given below, the Authority upholds the complaint that standards G1 and G6 were breached.



Decision

The members of the Authority have viewed the item complained about and have read the correspondence which is listed in the Appendix. On this occasion, the Authority determines the complaint without a formal hearing.

The resident nutritionist of the *Good Morning* programme broadcast by TVNZ discussed soy products with a representative of the International Soy Advisory Board, in conjunction with a cooking demonstration, on 3 May 1999 beginning at 10.00am. The benefits of soy consumption were said to include a lower incidence of heart disease, improved reproductive health, reduction in the incidence of osteoporosis and alleviation of the symptoms of menopause. A variety of soy products were identified as containing qualities which provide those benefits.

Mr James complained to TVNZ that the programme was not fair and balanced in that it promoted "non-existent health benefits" of soy products and failed to warn of their known health risks for which, he said, there was ample medical and scientific evidence. He also objected to the programme's promotion of named commercial products, and its failure to advise that the guest was a consultant to or an employee of the Sanitarium Health Food company. Finally, he complained that TVNZ had failed to allow time for opposing views to be heard. He attached a letter from the USFDA's National Centre for Toxicological Research which, he said, cited evidence of occurrence of dementia, brain atrophy, autoimmune thyroiditis and reproductive malformation as a result of consuming soy products.

In its response, TVNZ advised that it had considered the complaint under standards G1 and G6 of the Television Code of Broadcasting Practice. Those standards require broadcasters:

- G1 To be truthful and accurate on points of fact.
- G6 To show balance, impartiality and fairness in dealing with political matters, current affairs and all questions of a controversial nature.

TVNZ explained that its resident nutritionist featured regularly. On this occasion, she was joined by a dietitian and consultant nutritionist based in Australia who, although an independent practitioner, was a member of the International Soy Advisory Board. TVNZ stressed that this segment of the programme was not paid for by any commercial company, but was part of the editorial content of *Good Morning*.

It noted that the guest was introduced as representing the International Soy Advisory Board and it was not surprising therefore that she spoke warmly of soy products. The views she gave were clearly her own, it added, although much of what she said was "well founded in current research". It continued:

In considering the matter of a guest presenting her views we were reminded that standard G3 of the Codes of Broadcasting Practice acknowledges the right of people to express their own opinions.



In TVNZ's view, the programme was not presented as a serious investigation into the pros and cons of soy products. Essentially, it argued, it was a cooking demonstration carried on while the guest discussed different types of soy product.

As far as standard G1 was concerned, TVNZ responded that it had no qualifications to rule on which of the material provided by Mr James and by the International Soy Advisory Board was true and accurate, noting that there were some discrepancies between them.

TVNZ argued that standard G6 was not really applicable to what was essentially a cooking demonstration. It pointed out that there were many food products over which there was debate concerning health risks. In the context of a cooking programme, it argued, it would not be appropriate to outline such risks. It declined to uphold the complaint.

In subsequent correspondence with TVNZ, Mr James questioned its reference to a meeting of the International Soy Advisory Board as confirmation that the Board had international standing. Mr James contended that the "meeting" had been convened by Sanitarium, and noted that the Board's email address was the same as that of Sanitarium's public relations representative in Australia.

When he referred the matter to the Authority, Mr James complained that TVNZ had failed to give consideration to the substance of the complaint. In particular, he claimed that TVNZ had ignored the complaint that the programme involved medicinal claims for foodstuffs, and therefore breached the Medicines Act.

He also complained that TVNZ had failed to take into account the international research reports, which he had provided to it, which demonstrated that soy products could be harmful. He claimed that TVNZ's peremptory dismissal of his complaint was evidence of its bias towards one of its largest advertisers (Sanitarium).

To TVNZ's assurance that the segment was programme material and not a product promotion, Mr James responded that this was not clear to viewers. In particular, he claimed, the visit of the guest to this country had been paid for by Sanitarium.

In concluding, he stated that TVNZ could have avoided all the paperwork involved in the complaint had it "acted with the slightest regard to democratic principles and given the truth equal time" on the programme. He enclosed "the full file of correspondence" between TVNZ and himself on the matter.

In its response to the Authority, TVNZ gave an assurance that the segment had not been paid for by the company. The programme content, it said, was under the editorial control of the programme's producer.

TVNZ said that it was satisfied that the guest had the qualifications to speak with authority on the subject of soy products, and reiterated that the views presented were her own. It provided a letter from her in which she outlined her background and qualifications, and gave some general information about the Soy Advisory Board.



It advised that it had nothing further to add, except to note that any broadcaster was entitled to accept the expertise of its guests, whatever the subject matter.

When he made his final comment to the Authority, Mr James first addressed the issue of the guest's qualifications. He referred to her web page, and described her as a "nutritional consultant for hire", noting that she had appeared on the programme as what he called a "paid representative of Sanitarium". Her academic qualification was a Bachelor's degree, he noted, and she had no record of having published any original research. On the other hand, he continued, those who contended that dietary soy products could cause harm were "eminently credentialled post-doctoral scholars" with numerous published papers to their credit. He provided samples of their research reports. He also cited other similar research findings, providing excerpts from the research reports.

Mr James emphasised that he was not intending to attack the programme's guest personally. However, he added, the matter was not trivial, as it was a deliberate attempt to portray "poisons as health foods" against the overwhelming weight of scientific opinion. He agreed that the guest was entitled to express her opinions, as long as it was clear they were merely her opinions and not presented as fact.

Mr James reiterated comments made previously, including noting that, on the basis of his inquiries, the International Soy Advisory Board appeared to have no legal status and that one of its three offices was "a drop-box at a public relations firm in Sydney".

Whether or not the guest was qualified to discuss soy products, Mr James contended that it should have been made clear that she was a paid consultant to Sanitarium. He also maintained that the health claims she made appeared to breach both the Food Act and the Medicines Act, and argued that it was in the public interest to have the other side of the issue put. Further, he emphasised that it was in the public interest for a clear distinction to be made between promotional advertising and editorial material.

His concern, he said, had added weight when it was pointed out that the risks of permanent hormonal damage from soy "poisons" were greatest for women and children, and the programme was aimed specifically at women. Some of the claims made by the guest, he observed, had already been found to breach the Advertising Code of Ethics in another forum. In addition, he noted that the Ministry of Health had previously notified Sanitarium and the Television Commercials Approvals Bureau that therapeutic claims for a food product were not permitted under the Medicines Act. He observed that it was immaterial whether that was in programme material or advertising.

Finally, Mr James advised that the Commerce Commission had commenced three prosecutions against Sanitarium under the Fair Trading Act for claiming health benefits for So Good soy milk. As a result, Sanitarium had agreed to undertake to ensure that all of its promotions complied with the Fair Trading Act. He suggested that TVNZ had been a party to breaching that settlement by its broadcast of the segment on *Good Morning*.



The Authority's Findings

The Authority does not intend to deliberate on, or judge, the debate between those who advocate the nutritional values of soy and those who argue otherwise. It acknowledges that each side of this argument can advance positions, accompanied by research, which supports its perspective.

In its consideration of the complaint that the broadcast was inaccurate, and so in breach of standard G1, the Authority has examined how the "independent nutritionist" who appeared on the show came to be so described. In reaching its decision on this point, and on other matters, the Authority takes note of TVNZ's clear statement that the segment complained about was not paid for as advertorial, and that the content was under TVNZ's editorial control.

The independent nutritionist was presented as a representative of the International Soy Advisory Board. The Authority acknowledges TVNZ's point that such an industry representative will, most likely, speak positively about the product with which the Board is involved. The Authority considers that the organisation's title also implies that while it is an industry group, it may well also be independent from the manufacturers which use the industry's product.

The complainant has made material available to the Authority which suggests that the "independent" nutritionist is closely associated with Sanitarium. TVNZ has insisted that the nutritionist was independent, but has not answered Mr James' comments in regard to her relationship with Sanitarium. The material discloses that the nutritionist was closely aligned to Sanitarium, the makers of So Good. By failing to disclose this relationship in a programme where she spoke positively of So Good, apparently as an "independent" nutritionist, the Authority concludes that the broadcast, through this omission, breached the requirement in standard G1 to be truthful and accurate on points of fact.

In reaching this conclusion, the Authority notes that independent experts can be expected to present a balanced perspective on their area of expertise. Where they have a personal perspective on an issue, that ought to be placed in context for the viewer, or a breach of accuracy standards may well occur. Similarly, if an expert is aligned to product promotion, that ought to be made clear. In other words the status of an expert may breach accuracy requirements if it is not clearly explained, as a partisan position may mislead the viewer. In the Authority's view it did so here.

Turning to standard G6, the Authority notes TVNZ's claim that the item was essentially a cooking demonstration and that such a programme would not be expected to outline the health risks of ingredients being used. This may well be so. However, when making claims about the health benefits of ingredients which are themselves a matter of controversy, then the Authority considers that the broadcast should at least acknowledge the existence of that controversy. In this instance, the cooking demonstration involved the use of soy, and the claimed benefits of the product were promoted extensively. Those claimed benefits are a matter of contention and there is controversy. The Authority concludes that this raises questions of a "controversial nature" to which standard G6 applies.



The Authority notes that no effort was made on the programme to point out that there is significant disagreement among the experts about the claimed health benefits of soy. As these criticisms were not raised or discussed, the Authority concludes that the programme lacked impartiality and balance, and that the standard was breached.

For the above reasons, the Authority upholds the complaint that a segment on *Good Morning* on 3 May 1999, broadcast by Television New Zealand Ltd, breached standards G1 and G6 of the Television Code of Broadcasting Practice.

As the Authority notes above, TVNZ insisted that it retained editorial control of the segment complained about, and stated explicitly that the segment had not been paid for by any commercial company. The Authority notes that there is an increasing tendency in broadcasts of this type to blur the lines between programmes which are editorial, advertorial, infomercial and/or advertisements. The Authority points out that complaints about editorial content are its responsibility, while complaints about advertisements are the responsibility of the Advertising Standards Complaints Board.

The Authority acknowledges that the increasing overlap between these types of programmes is part of a developing practice in broadcasting. To enable viewers to understand clearly whether a broadcast is essentially a programme under the editorial control of the broadcaster, or an advertisement, the Authority signals that it considers that the Television Code of Broadcasting Practice, when next revised, should include a provision similar to the two following standards. It will consult with broadcasters accordingly.

The first is guideline 7f from the recently revised Radio Code of Broadcasting Practice. It reads:

- 7f Advertisements and infomercials shall be clearly distinguishable from other programme material.

The second is Rule 1 of the Advertising Code of Ethics which states:

1. **Identification** – Advertisements should be clearly distinguishable as such, whatever the form and whatever the medium used; when an advertisement appears in a medium which contains news or editorial matter, it must be presented so that it is readily recognised as an advertisement.

Having upheld a complaint, the Authority may make orders under s.13 or s.16 of the Broadcasting Act. It invited submissions from the parties on the question of penalty. TVNZ said it was prepared to broadcast a statement if the Authority considered that a penalty was warranted, while Mr James sought "equal time" for an expert to advance a scientific discussion of the issue.

Having considered the submissions, the Authority concludes that a statement summarising this decision is the appropriate penalty in this instance.



ORDER

Pursuant to s.13(1) of the Broadcasting Act, 1989, the Authority orders Television New Zealand Ltd to read a statement, to be approved by the Authority, summarising this decision, within one month of the date of this decision, on the *Good Morning* programme.

Signed for and on behalf of the Authority



Sam Maling
Chairperson

16 September 1999



Appendix

The following correspondence was received and considered by the Authority when it determined this complaint:

1. Mr R F James's Complaint to Television New Zealand Ltd – 13 May 1999
 2. TVNZ's Response to the Formal Complaint – 18 May 1999
 3. Mr James's Further Letter to TVNZ – 21 May 1999
 4. Mr James's Further Letter to TVNZ plus attachments – 23 May 1999
 5. Mr James's Referral to the Broadcasting Standards Authority plus attachments – 31 May 1999
 6. TVNZ's Response to the Authority plus attachments – 8 June 1999
 7. Mr James's Final Comment plus attachments – 24 June 1999
 8. Further Comment from Mr James – 27 June 1999
 9. Further Comment from Mr James plus attachments – 30 June 1999
 10. Mr James's Submission on Penalty – 11 August 1999
 11. TVNZ's Submission on Penalty – 12 August 1999
- Mr James's Response to TVNZ's Submission – 16 August 1999





16 September 1999

CF 2/614

R F James
RD 4
WHANGAREI

Dear Mr James

I have been asked to advise you that the Broadcasting Standards Authority has upheld your complaint about an item broadcast on TV1 on 3 May 1999.

A copy of Decision No 1999-148 is enclosed. The Decision will be released to the media and subscribers on Monday 20 September 1999.

Your attention is drawn to s.18 of the Broadcasting Act 1989 which provides that a complainant or a broadcaster may appeal a decision of the Authority to the High Court. Any appeal must be lodged within one month of the date of this decision.

Yours sincerely

Phillipa Ballard
Complaints Manager



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